



Facilitation, Collaboration & Conflict Management

To: Representatives of AOC Signatories
Date: July 24, 2017
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Facilitator Memo #5: Risk in Data Sharing

On a couple of occasions during our discussions, representatives from the Navy side of this matter have expressed concern that BWS was seeking information in order to bolster a lawsuit, or "build a case." Having spent considerable time in litigation and continuing to serve as an arbitrator, I thought I could comment on this issue. I believe there are some general principles or guidelines relevant to this concern.

Litigants are generally entitled to relevant information in litigation so long as the request is not unduly burdensome. If litigation is commenced, courts will generally move into a "discovery" phase in which parties exchange document requests and conduct other forms of discovery. Discovery is supported by the courts in order to permit a fair trial and prevent surprise (e.g., a litigant should not generally be hearing of something for the first time during the trial). In this matter, I hope litigation does not arise. Litigation would be expensive, and in my view, unnecessary as long as all parties are working in good faith.

Because litigation permits discovery, there is no reason for the Navy to withhold documents at this time – if litigation does occur, the documents will eventually be produced. Of course, information that is classified, protected under the Patriot Act or sensitive procurement data must be dealt with properly and in accord with applicable law and regulations.

There are limitations on discovery. Courts will generally deny or limit discovery where:

- ✧ The requested documents or information are protected by privilege
- ✧ The discovery requests are excessively broad or burdensome
- ✧ The documents contain confidential information
- ✧ The requested documents are not relevant to the case. Relevant generally means the documents or information would make a material fact more likely or less likely.

Courts generally may issue orders to protect the distribution of confidential information. If the information involves national security, special procedures and laws apply. If documents are publicly available, claims of confidentiality are typically denied.

Where litigants seek documents to "build a case," the dispute is often whether the party seeking the information is engaged in a "fishing expedition." It does not seem to me, based on what I have heard to date, the BWS requests are to build a case. Typically, a party seeking to "build a case" is seeking financial documents or communications among third parties in efforts to determine whether there is been financial impropriety, or communications which would demonstrate lack of goodwill (such as communications showing one party intended to breach a contract or interfere with the other party.) Such efforts would seem unlikely in this matter.

Providing information informally is much less expensive than in court discovery. There is often an advantage in some form of document exchange outside of court proceedings as it is much less complex and less expensive.